Ding Siew Ching v Ling Peek Hoe

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-02–203 OF 2010
CLEMENT SKINNER, AZIAH ALI AND MOHAMAD ARIFF JJCA
2 OCTOBER 2013

Legal Profession — Professional discipline — Suspension from practice — Appeal against decision of disciplinary board was dismissed by the High Court — Duty owed by disciplinary board to safeguard and protect members of public — Whether disciplinary committee had exceeded parameters of complaint against appellant — Whether findings of disciplinary committee inconsistent — Whether the High Court judge's failure to hand down written grounds of judgment constituted sufficient reason for appellate intervention — Whether punishment excessive or disproportionate to degree of professional misconduct of appellant

The appellant, an advocate and solicitor, had acted for the respondent in several sale and purchase transactions. The respondent made a complaint that consisted of made allegations of fraudulent misrepresentation and fraud against the appellant to the Disciplinary Board of the Bar Council ('DB'). The main thrust of the respondent's complaint was that there was conflict of interest between the appellant's personal interests and her professional duty towards him, in that, despite knowing that he was a customer of a money-lending firm in which the appellant's brothers were partners, the appellant had allowed herself to be used as an instrument of fraud when handling the respondent's land transactions. The investigating tribunal set up by the disciplinary board recommended that the disciplinary committee ('the DC') should carry out a formal investigation into this complaint. The DC found that 'there was a serious degree of conflict of interest, a touch of dishonesty and a great deal of lack of professional transparency' on the part of the appellant. Consequently, the DC found the appellant to be in breach of s 94(3)(d), (k), (n) and (o) of the Legal Profession Act 1976 and recommended that the appellant be suspended from practice for a period of 18 months. The DB ordered the suspension of the appellant for 18 months. The appellant's appeal to the High Court was dismissed and hence the present appeal. The appellant submitted that the DC had exceeded the parameters of the complaint against the appellant and that the decision of the DC was riddled with inconsistencies. The appellant further submitted that the High Court judge's failure to hand down written grounds of judgment constituted sufficient reason for an appellate court to intervene. The appellant went on to argue that the punishment was manifestly excessive.

Held, dismissing the appeal with costs of RM10,000:

(1) Based on the evidence, the DC's findings were in respect of matters which

were well within the scope of the complaint being investigated by the DC. Further, there was no substance to the appellant's contention that the main findings of the DC were inconsistent with its subsidiary findings (see para 13).

(2) The lack of written grounds of judgment had not deprived the appellant of due process and therefore to justice. Even though the High Court judge had not given detailed reasons for his decision, by affirming the decision of the DB, which had accepted the findings and the recommendations of the DC, the High Court judge, who was exercising his appellate jurisdiction, had clearly decided not to interfere with the findings of fact made by the DC. Accordingly, this appeal should not be allowed solely for the reason that the High Court judge failed to write his grounds of judgment (see para 16).

(3) The findings of the DC clearly established that the appellant's conduct had amounted to professional misconduct. The DC also described the misconduct as serious and observed that such misconduct if left unchecked would undermine the dignity of the legal profession and erode the very essence of the solicitor-client relationship. The DB, a statutorily constituted body of persons that acted as custodian of the high traditions of the legal profession, had accepted the findings and recommendation of the DC to suspend the appellant. There was no reason to interfere with this decision. The decision of the DC or the DB was not absurd so as to warrant appellate interference. Neither was the punishment excessive or disproportionate to the degree of professional misconduct of the appellant, which was described as serious (see paras 19–20).

[Bahasa Malaysia summary

Perayu, peguamcara dan peguambela, telah bertindak untuk responden dalam beberapa transaksi jual dan beli. Responden membuat aduan yang mengandungi tuduhan yang dibuat mengenai salah nyata dan penipuan terhadap perayu kepada Lembaga Tatatertib Majlis Peguam ('LT').Teras utama aduan responden adalah bahawa terdapat pertikaian kepentingan di antara kepentingan peribadi perayu dan tugas profesionalnya terhadap responden, di mana, walaupun menyedari yang dia adalah pelanggan firma pinjaman wang di mana saudara-saudara lelaki perayu adalah rakan kongsi, perayu telah membenarkan dirinya digunakan sebagai alat penipuan apabila mengendalikan transaksi tanah responden. Tribunal siasatan yang dibentuk oleh lembaga tatatertib mencadangkan bahawa ahli jawatankuasa tatatertib ('JT') patut menjalankan siasatan rasmi ke dalam aduan ini. JT mendapati bahawa 'there was a serious degree of conflict of interest, a touch of dishonesty and a great deal of lack of professional transparency' pada pihak perayu. Akhirnya, JT mendapati perayu memungkiri s 94(3)(d), (k), (n) dan (o) Akta Profesion Undang-Undang 1976 dan mencadangkan bahawa perayu

digantung daripada beramal selama 18 bulan. LT memerintahkan penggantungan perayu untuk 18 bulan. Rayuan perayu kepada Mahkamah Tinggi ditolak dan maka rayuan ini. Perayu berhujah bahawa JT telah melebihi parameter aduan terhadap perayu dan bahawa keputusan JT penuh dengan tidak konsisten. Perayu selanjutnya berhujah bahawa kegagalan hakim Mahkamah Tinggi untuk memberi alasan penghakiman bertulis membentuk alasan yang mencukupi untuk mahkamah rayuan campur tangan. Perayu seterusnya berhujah bahawa hukuman adalah terlalu berlebihan.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Berdasarkan keterangan, dapatan JT adalah berkenaan perkara yang terangkum dalam skop aduan yang disiasat oleh JT. Selanjutnya, tiada asas kepada hujahan perayu bahawa dapatan utama JT tidak konsisten dengan dapatan subsidiarinya (lihat perenggan 13).

(2) Ketiadaan alasan penghakiman bertulis tidak menafikan perayu terhadap proses dan oleh itu kepada keadilan. Walaupun hakim Mahkamah Tinggi tidak memberi alasan terperinci untuk keputusannya, dengan mengesahkan keputusan LT, yang menerima dapatan dan cadangan-cadangan JT, hakim Mahkamah Tinggi, yang menjalankan bidang kuasa rayuannya, jelas memutuskan untuk tidak campur tangan dengan dapatan fakta yang dibuat oleh JT. Oleh itu, rayuan ini tidak patut dibenarkan semata-mata untuk alasan bahawa hakim Mahkamah Tinggi gagal menulis alasan penghakimannya (lihat perenggan 16).

(3) Dapatan JT jelas membuktikan yang tingkah laku perayu menyebabkan kepada salah laku profesional. JT juga menjelaskan salah laku sebagai serius dan menyatakan bahawa salah laku sedemikian jika tidak dipantau akan menjejaskan maruah profesion undang-undang dan menghakis inti pati hubungan peguambela-anak guam. LT, badan yang terbentuk secara statutori yang bertindak sebagai penjaga tradisi tertinggi profesion undang-undang, telah menerima dapatan dan cadangan JT untuk menggantung perayu. Tiada alasan untuk campur tangan dengan keputusan ini. Keputusan JT atau LT tidak mustahil untuk mewajarkan campur tangan mahkamah rayuan. Juga hukuman tidak berlebihan atau tidak seimbang sehingga ke tahap salah laku profesional perayu, yang dijelaskan sebagai serius (lihat perenggan 19–20).]

Notes

For cases on suspension from practice, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1919–1926.

Cases referred to

Flannery and Anor v Halifax Estate Agencies Ltd [2000] 1 WLR 377, CA (refd)

Lim Lek Yan @ Lim Teck Yam v Yayasan Melaka and another application [2010] 1 MLJ 173, FC (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651; [1998] 4 CLJ 812, CA (refd)
English v Emery Rimbold & Strick Ltd, DJ & C Withers (Farms) Ltd v Arabic Equipment Ltd, Verrechia v Commissioner of Police of the Metropolis [2002] 1 WLR 2409, CA (refd)

Legislation referred to

Legal Profession Act 1976 ss 94(3)(d), (k), (n), (o), 100

Appeal from: Civil Appeal No 17–28 of 2007 (High Court, Ipoh)

Datuk N Chandran (Chan Kok Keong, Ranjan Chandran and Goh Ngai Chean with him) (Chan & Associates) for the appellant.
Edmund Lim Yun (Hong Chiew King & Co) for the respondent.
Baba Raj Rajagopal (Disciplinary Board) for the disciplinary board.

Clement Skinner JCA (delivering judgment of the court):

[1] We had earlier dismissed the appeal of Ding Siew Ching ('the appellant'). These are our reasons for doing so.

BRIEF FACTS

[2] The appellant is an advocate and solicitor practicing at Sitiawan, Perak.

[3] By a letter dated 24 December 2004 Mr Ling Peek Hoe ('the respondent') made a complaint against the appellant to the disciplinary board of the Bar Council. The essence of the respondent's complaint is contained in para 3 of his letter which reads:

> I lost 2 pieces of land to Miss Ding's brothers through her fraudulent misrepresentation. I trusted her as a lawyer but she betrayed my trust by allowing herself to be used as an instrument of fraud.

RECOMMENDATIONS OF INVESTIGATING TRIBUNAL

[4] Following the complaint received, the disciplinary board set up an Investigating Tribunal pursuant to s 100 of the Legal Profession Act 1976 ('the LPA') to look into the complaint. On 4 April 2007 after some 12 days of hearing, the Investigating Tribunal presented its report and its recommendation which reads:

A The Tribunal unanimously agreed that there should be a formal investigation by a Disciplinary Committee on this complaint.

Disciplinary Committee's findings and recommendations

B **[5]** A disciplinary committee was duly set up on 6 June 2007. On 29 September 2007 after some 12 days of hearing the disciplinary committee presented its report. The disciplinary committee came to the following findings:

C (a) DTB (ie Ding Toh Biew), Ding Toh Gien and Ding Toh Lie were and are partners of the firm of Golden Star, a moneylending firm and they are also the brothers of the respondent (meaning the appellant here as she was responding to the complaint);

D (b) The respondent (appellant) knew or had knowledge of the fact that the complainant was a customer of Golden Star as early as 25 July 1996 as she prepared the consent letters …;

(c) … we have no doubt in our mind that the complainant went to the respondent's (appellant's) office … and executed most of the documents E without the benefit of advice from an independent source;

(d) the respondent (appellant) had admitted that she prepared, as solicitor for both the parties, the sale and purchase agreements dated 10 March 1997 in relation to No 59, Taman llmu and the sale and purchase F agreements dated 27 August 1997, 29 August 1997, 23 December 1998 and 23 December 1998 respectively in respect of Kampong Selamat land and related transfers;

(e) it is our considered view that there was an elementary obligation on the part of the respondent (appellant) to explain to the complainant there G was a 'conflict of interest' and that it is a situation in which someone in a position of trust, has competing professional interest or personal interest and that such competing interests can make it difficult to fulfill his or her professional duties impartially … we are of the unanimous view that she (the appellant) took no positive steps to avert the consequences of H conflict of interest or paid little or no attention to the fact that a conflict of interest existed in the matter. There is no satisfactory evidence indicating or implying that she took any trouble to mitigate the situation either by removal, disclosure, recusal or third party evaluation;

I (f) there is sufficient evidence from the oral testimony and the documentary evidence that the respondent (appellant) carried out a lot of work as solicitor for the complainant without the complainant's authority in writing or his knowledge;

(g) in her evidence in chief, the respondent (appellant) repeatedly

maintained that the deposit sums or the balance of the purchase price although large, did not pass from the vendors to the purchaser in her presence … Such conflicting actions by the respondent (appellant), brings us to the single and irresistible conclusion that she knew that the deposits and the balance of purchase prices were in fact not paid to the complainant but utilised to contra or settle money lending transactions;

(h) from the manner in which she conducted the transactions, we doubt very much she maintained her client's account or her office account in any form, leave alone an orderly form.

(i) … respondent (ie appellant) admitted … that DBT and the complainant had, well after the transactions were complete, came to her office to settle their account and on the instructions of DBT she prepared four vouchers, based on the recomputed purchase price of Kg Selamat lands, for signature by the complainant;

(j) respondent (appellant) also admitted … that the voucher was amended by her with the use of 'liquid paper' so that the date and the amount appeared therein will tally with her computation of the purchase consideration. She was not certain whether she did the correction before or after it was signed by the complainant;

(k) looking at the whole matter in the light of the relationship between the respondent (appellant) and the partners of Golden Star and the manner in which the transactions were carried out in a somewhat questionable and unprofessional manner, one is tempted to ask whether the respondent (appellant) carried out her work dishonestly or shut her eyes to an obvious act of dishonesty or acted recklessly in failing to disclose material facts to the complainant. But there is no proof beyond reasonable doubt to reach a positive conclusion;

(l) it has been decided in … that in cases of allegation of fraud the standard of proof required is proof beyond reasonable doubt. Since we are bound by judicial decision, we with much reluctance, give the benefit of doubt to the respondent (appellant) and accordingly dismiss the complainant's allegation that the respondent (appellant) was guilty of dishonest or fraudulent conduct in the discharge of her duties;

(m) however, there is ample evidence that the respondent (appellant) had shown little or no regard to safeguard the interest of the complainant;

(n) the respondent (appellant) also allowed DTB a free hand to use her office and facilities to the extent he was messing about her office as it pleased him;

(o) as can be seen from the foregoing, there was a serious degree of conflict of interest, a touch of dishonestly and a great deal of lack of professional

A transparency and we therefore unanimously find the respondent (appellant) in breach of ss 94(3)(d), (k), (n) and (o) of the Legal Profession Act 1976.

B **[6]** The disciplinary committee recommended that the appellant be suspended from practice for a period of 18 months.

DECISION OF DISCIPLINARY BOARD

C **[7]** On 17 November 2007 the disciplinary board, after considering the report of the disciplinary committee, ordered the suspension of the appellant from acting as an advocate and solicitor for 18 months.

THE HIGH COURT DECISION

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[8] The appellant appealed against for order of the disciplinary board to the High Court. On 31 December 2009 the learned High Court judge in a brief decision held:

E Mahkamah mendapati prosidur-prosidur yang diikuti oleh IT, DC dan DB adalah berbetulan dengan peruntukan-peruntukan dan kuasa-kuasa di bawah Akta. Keputusannya berbetulan dengan fakta-fakta yang dikumpulkan.

F **[9]** The appellant's appeal was accordingly dismissed. The appellant has since obtained a stay of the order of the disciplinary board.

THIS APPEAL

G **[10]** Three main issues were raised before us. It was first argued that in cases of disciplinary action against a lawyer, of prime importance is the complaint made. According to the appellant the complaint against her is confined to allegations of fraudulent misrepresentation and fraud. In this regard, the appellant contends that since the disciplinary committee had come to a finding
H that the allegations against her must be dismissed as the allegations had not been proved to the standard required ie beyond reasonable doubt, it was wrong for the disciplinary committee to go on to find that 'there was a serious degree of conflict of interest, a touch of dishonesty and a great deal of lack of professional transparency' in what the appellant had done in respect of the
I transaction complained of. It is the appellant's case that in coming to its latter findings, the disciplinary committee had clearly exceeded the parameters of the complaint against the appellant. The appellant also contends that the decision of the disciplinary committee is riddled with inconsistencies, in that, after having dismissed the complaint, the disciplinary committee went on to

eventually conclude that there is sufficient merit in the complaint and recommend the appellant be suspended from practice for 18 months. A

[11] We do not agree with the appellant's contentions. Although the main thrust of the complaint against the appellant was of fraudulent misrepresentation or that she had allowed herself to be used as an instrument of fraud, the complaint arose in the context of a land transaction involving the appellant's own brothers where the complaint included an allegation that the complainant had trusted the appellant as a lawyer. Even though the letter of complaint was drafted in layman's terms it is our view that an allegation that trust had been reposed by the complainant in the appellant as the lawyer handling the transaction must necessarily include an expectation that the appellant would look after his best interests in the transaction. B C

[12] We have in an earlier part of this judgment set out some of the findings of fact made by the disciplinary committee which clearly indicate that the appellant, as the lawyer involved in the transaction, had put herself in a position of conflict of interest but had failed or taken no positive steps to avert the consequences of such conflict. There were also findings of fact made by the disciplinary committee that the appellant had acted for the complainant without the latter's authority in writing or knowledge; that the appellant knew that the deposits and balance of purchase prices were in fact not paid to the complainant but utilised to contra or settle money lending transactions, but yet she made the complainant sign her general vouchers for the balance of the purchase price even though the sums were not released through her office to the complainant; that the appellant admitted to amending a voucher with 'liquid paper' so that the date and the amount appearing therein will tally with the purchase consideration. D E F

[13] We therefore find that the disciplinary committee's findings that 'there was a serious degree of conflict of interest, a touch of dishonesty and a great deal of lack of professional transparency,' were findings in respect of matters which were well within the scope of the complaint being investigated into by the disciplinary committee. Further, the complaint, not being limited to the question of fraud alone, we find no substance to the contention that the main findings of the disciplinary committee are inconsistent with its subsidiary findings. G H

[14] The next issue raised by the appellant was that the learned High Court Judge did not hand down his written grounds of judgment. The appellant complains that by not doing so the learned judge had failed in his duty to explain the reasons for his decision which in itself constitutes sufficient reason for an appellate court to intervene and set aside the judgment of the High Court. In support the appellant referred us to the following cases: *Flannery and* I

Anor v Halifax Estate Agencies Ltd [2000] 1 WLR 377, *English v Emery Rimbold & Strick Ltd, DJ & C Withers (Farms) Ltd v Arabic Equipment Ltd, Verrechia v Commissioner of Police of the Metropolis* [2002] 1 WLR 2409, *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651; [1998] 4 CLJ 812 and *Lim Lek Yan @ Lim Teck Yam v Yayasan Melaka and Anor Application* [2010] 1 MLJ 173.

[15] Referring to the decision of the Federal Court in *Lim Lek Yan v Yayasan Melaka* where it was held that whether written grounds of decision are required or not depends on the facts in each and every case, it was the contention of the appellant that this present case is certainly of a nature where the written grounds of decision of the High Court judge are required to assist this court in determining whether from the totality of the facts before the learned judge, including the facts as adverted to in the report of the disciplinary committee the suspension of the appellant for a period of 18 months from practice is tenable both on the facts and in law.

[16] We have given this issue our anxious consideration and asked ourselves whether the lack of written grounds had deprived the appellant of due process and therefore to justice. We find it has not for the following reasons. The learned judge did not sit as a trial judge listening to the testimony of witnesses and evaluating their evidence. That function was undertaken by the disciplinary committee. In this case the learned High Court judge was exercising appellate jurisdiction. In arriving at his decision the learned High Court judge had the benefit of the report prepared by the disciplinary committee which was a very detailed report containing the findings of facts of the disciplinary committee upon the evidence led before it as well as the recommendations of the disciplinary committee upon those findings of fact. Even though the learned judge did not give detailed reasons for his decision, by affirming the decision of the disciplinary board which had accepted the findings and the recommendations of the disciplinary committee, the learned High Court judge, sitting in appeal had clearly decided not to interfere with the findings of fact made by the disciplinary committee. After reading the record of appeal we find the learned High Court judge was right in not doing so.

[17] This appeal proceeds before us by way of a rehearing and to assist us in arriving at our decision we have before us the same reports that were placed before the learned High Court judge. Before us the appellant has raised the same grounds and issues that she raised before the High Court judge, with the exception of the point on whether the Investigating Tribunal and the disciplinary committee had delivered their reports within the time allowed under the LPA, but that was a ground which it was not open to the appellant to take before the High Court in any event as she had never raised it as one of her grounds in her memorandum of appeal. Accordingly we do not find that

this appeal should be allowed solely for the reason that the learned High Court judge failed to write his grounds of judgment. A

[18] The appellant's final point is that the imposition on her of an 18 months period of suspension from practice by way of punishment is manifestly excessive, disproportionate and without factual or legal justification warranting appellate intervention. B

[19] We do not agree. In our judgment the findings of the disciplinary committee clearly establishes that in carrying out her duties as an advocate and solicitor in relation to the transaction involving the respondent here, the appellant's conduct had amounted to professional misconduct, in that, she had paid little or no attention to the fact that a conflict of interest existed or that she was not bothered with the consequence of such conflict. Further, that the appellant had shown little or no regard to safeguard the interest of the respondent here. C D

[20] The disciplinary committee described the misconduct as serious and drew attention to the fact that a judge in a neighbouring jurisdiction had observed that misconduct in practice by a lawyer has an impact on public confidence which, if left unchecked, will inexorably undermine the dignity of the legal profession and erode the very essence of the solicitor-client relationship. The disciplinary board accepted the findings and recommendation of the disciplinary committee to suspend the appellant. We agree with counsel for the respondent that the disciplinary board, a statutorily constituted body of persons, plays an important role in upholding the high standards of professional conduct and etiquette in the legal profession and acts as the custodian of the high traditions of the noble profession. We find no reason to interfere with the decision of the disciplinary board to suspend the appellant from practice for 18 months. The decision of the disciplinary committee or of the disciplinary board cannot be described as being absurd so as to warrant appellate interference. Nor do we find the punishment excessive or disproportionate to the degree of professional misconduct of the appellant which was described as serious. E F G H

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[21] It was for all the above reasons that we dismissed the appellant's appeal with costs of RM10,000 to the first respondent, deposit to be refunded.

Appeal dismissed with costs of RM10,000.

Reported by Kohila Nesan